Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FRANK J. GUARINI, GERALD McCANN, IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

vs.

THE STATE OF NEW YORK, and
THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
State of New York
120 Broadway
New York, New York 10271
(212) 341-2603

O. PETER SHERWOOD
Solicitor General
*JUDITH T. KRAMER
ELLEN J. FRIED
Assistant Attorneys General
of Counsel

**Counsel of Record*

QUESTIONS PRESENTED

Whether this Court should grant the petition for a writ of certiorari when the relief sought by individual citizens of one State, in an action brought against another State in state court, is a declaration as to which of the two States may exercise jurisdiction and sovereignty over certain land, when neither State desires to litigate the issue?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statement of the Case	1
A. Facts	1
B. Proceedings Below	3
Reasons for Denying the Writ	5
A. The Courts Below Correctly Determined That the State Courts of New Jersey Lack Jurisdiction Over This Action	5
B. This Action is Barred By the Doctrine of Sovereign Immunity	7
C. The Principle of Comity Bars This Action	9
D. Petitioners Lack Standing To Bring This Case Against These Respondents	10
Conclusion	11

TABLE OF AUTHORITIES

Cases	Page
Arizona v. New Mexico, 425 U.S. 794 (1976)	6
Bergen County v. Port of N.Y. Authority, 32 N.J. 303, 160 A.2d 811 (1960)	10
Cass v. State, 58 N.Y.2d 460, 448 N.E.2d 786 (1983)	7
Durfee v. Duke, 375 U.S. 106 (1963)	6
English v. Newark Housing Authority, 138 N.J. Super. 425, 351 A.2d 358 (App. Div. 1976)	7
Glen v. Rockefeller, 61 Misc.2d 942, 307 N.Y.S.2d 46 (Sup. Ct. N.Y. Co.; 1970) *aff'd*, 34 A.D.2d 930, 313 N.Y.S.2d 938 (1st Dept. 1970)	7
Guarini v. State of New York, 215 N.J. Super. 426, 521 A.2d 1362 (Ch. Div. 1986) *aff'd* 215 N.J. Super., 293, 521 A.2d 1294 (App. Div. 1986)	4
Hill v. Joseph, 205 Misc. 441, 129 N.Y.S.2d 348 (Sup. Ct. N.Y. Co., 1954)	6,7
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)	6
Interstate Wrecking Co., Inc. v. Palisades Interstate Park Comm'n., 57 N.J. 342, 273 A.2d 10 (1971)	9
Liquid Carbonic Corp. v. City of New York, 150 N.J. Super. 119, 374 A.2d 1258 (App. Div. (1977))	9

Page

Martin v. Educational Testing Service, Inc., 179 N.J. Super. 317, 431 A.2d 868 (Ch. Div. 1981) .. 9

Nebraska v. Iowa, 406 U.S. 117 (1972) 5

Nevada v. Hall, 440 U.S. 410 (1979) 7

New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 411 A.2d 168 (1980) 10

Ohio v. Kentucky, 410 U.S. 641 (1973) 5

Salorio v. Glaser, 82 N.J. 482, 14 A.2d 943, *appeal dismissed* and *cert. denied*, 449 U.S. 804, 449 U.S. 874 (1980) 10

Texas v. New Mexico, 462 U.S. 554, (1983) 5,6,9

STATUTES

4 U.S. Stat. 708, ch. 126 1

28 U.S.C. § 1251(a) 7

28 U.S.C. § 1441, et seq. 3

U.S. Constitution

United States Constitution, Art. III, Sec. 2, Cl. 2 . 7

No. 86-1739

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANK J. GUARINI, GERALD McCANN, IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

vs.

THE STATE OF NEW YORK, and
THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW YORK

STATEMENT OF THE CASE

A. *Facts*

In 1834, Congress approved a Compact entered into by the States of New York and New Jersey establishing the boundaries of the two states. (4 U.S. Stat. 708, ch. 126). Under the terms of the Compact, New York retained jurisdiction over Liberty and Ellis Islands. It has continued to exercise jurisdiction over the Islands under the Compact for the past 150 years, and collects sales and income taxes on the Islands.

Eleven residents of the State of New Jersey initiated this action against the State of New York as a defendant and the

State of New Jersey as a "necessary defendant" by filing a Complaint in the Superior Court of New Jersey, Chancery Division, Hudson County, on November 9, 1984. The Writ here is sought by only seven of these residents.

In their complaint, petitioners alleged that to the extent that the Compact of 1834 has been interpreted or construed as permitting the exercise of sovereignty over Ellis and Liberty Islands by New York, rather than New Jersey, the Compact is void and *ultra vires* the powers of the signatories.

The complaint further alleges that each petitioner was a resident, citizen and taxpayer of New Jersey who suffered injury as a direct beneficiary of lands held in trust by the sovereign, New Jersey, for the benefit of the people of New Jersey. Petitioners Frank J. Guarini, Gerald McCann, Dr. Irwin Silverman, and John J. Stiles, relied upon their status in such capacity to bring this suit.

Petitioners claimed further injury by virtue of the levy and collection of sales and income taxes by New York, which they claim have deprived and will continue to deprive New Jersey of tax revenues. Petitioners claimed that such tax revenues, if collected by New Jersey, would lessen the tax burden on them by providing greater revenues to New Jersey.[1]

Petitioner Colon alleged too that she once paid $1.35 in sales tax to New York while on Liberty Island for her purchase of a replica of the State of Liberty, a banner and a souvenir plate

---

[1] A "Memorandum of Understanding In Regard to Establishing a Bi-State Public Corporation To Be Known As The Statue of Liberty Trust Fund" was signed by Governors Cuomo and Kean, on June 30, 1986. The purpose of the agreement is to aid homeless persons in both States through grants of money collected by the Fund. Revenue for the Fund will come from taxes collected by both states directly related to the Islands. The proposed agreement has been approved by the NJ legislature (N.J. brief, 2)[2] and is currently pending approval by the New York State Legislature.

[2] References to "N.J. brief, ____" are page references to the brief and appendix filed by the State of New Jersey.

and that the amount of sales tax paid to New York was greater than that which she would have been required to pay to New Jersey if New Jersey had been the sovereign exercising governmental authority over Liberty Island.

Petitioners Bisharian and Irwin, as members of the United Association of Plumbers, Pipe Fitters and Sprinkler Fitters, Local 274, AFL-CIO, located in Ridgefield, New Jersey, alleged the additional injury of loss of job opportunities. That allegation was based upon their unsupported belief that labor contracts for restoration and construction on Liberty and Ellis Islands have been and would continue to be awarded to New York unions because of New York's allegedly wrongful exercise of governmental authority over the Islands.

By way of relief, the Complaint sought a declaration *inter alia*, that the 1834 Compact, entered into between New York and New Jersey and approved by Congress, is "void and *ultra vires* the powers of the signatories" and that certain police and sovereign powers over Ellis and Liberty Islands, which includes the power to levy and collect taxes, are being wrongfully exercised by New York. Petitioners requested that a constructive trust be imposed upon tax revenues already collected by New York and that an injunction issue restraining New York from future collection of taxes. Petitioners also sought certain declarations presumed to have some potential bearing upon the award of contracts to labor unions in New Jersey for renovations on Liberty Island and future construction on Ellis Island. Nowhere in the original complaint did petitioners allege that any of their constitutional or federal statutory rights had been violated.

B. *Proceedings Below*

On December 19, 1984, New York filed a Petition for Removal to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1441, *et seq.* It filed its Answer to the Complaint in the District Court on December 26, 1984 and filed an Amended Answer on January 15, 1985.

Petitioners' motion to remand this action to the Superior Court of New Jersey was granted, on or about August 28, 1985, on

the ground that the removal petition was silent as to why New Jersey had not consented to removal. On September 23, 1985, the District Court denied New York's motion to reconsider its order of remand.

Following remand, the State of New York filed an Answer and a motion to dismiss the Complaint on the grounds, *inter alia*, that the action is barred in the state courts of New Jersey by the doctrine of sovereign immunity; that the Supreme Court of the United States has original and exclusive jurisdiction over the true subject matter of this action; and that petitioners lack standing to bring this action in the state courts of New Jersey.

Petitioners filed a cross-motion for summary judgment, which addressed the merits of their claims. The State of New Jersey filed an Answer urging dismissal of the Complaint (N.J. brief, 16a) but submitted a letter brief opposing New York's motion to dismiss and supporting petitioners' cross-motion for summary judgment.

Argument on the cross-motion was heard by Judge Humphreys on January 17, 1986. In an oral opinion rendered on March 18, 1986 (subsequently edited and submitted for publication, *Guarini v. The State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Ch. Div. 1986)), Judge Humphreys dismissed the Complaint and denied petitioners' motion for summary judgment. (Pet. 8a-49.1a).[3] The court held that due to (i) a lack of subject matter jurisdiction over the gravamen of the Complaint, (ii) the sovereign immunity of the State of New York, (iii) considerations of interstate comity, and (iv) petitioners' lack of standing, petitioners have no right to litigate these claims against respondents in the state courts of *New Jersey*. The order of dismissal was entered on April 1, 1986 and petitioners appealed.

The Appellate Division, in a *per curiam* opinion filed on November 21, 1986, affirmed substantially for the reasons expressed by the trial court. 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986). The Petition for Certification was denied and the appeal was dismissed by the New Jersey Supreme Court. (Pet. 1a-2a).

---

[3] Page references to "Pet. ____a" are to the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

In their Statement of the Case, petitioners attempt to persuade this Court that the New Jersey state courts were in error for refusing to reach the merits of their claims as well as for refusing to construe the provisions of the 1834 Compact. Moreover, they attempt to raise constitutional issues, such as violations of the commerce clause and the due process clause of the Fourteenth Amendment, which were not raised before the trial court.

Both the trial court and the New Jersey appellate courts properly disposed of this case on four independent grounds. The State of New York respectfully submits that all four reasons for dismissal are valid and that petitioners have failed to cite any authority which would justify disturbing the decisions of the New Jersey courts or warrant review by this Court.

A. *The Courts Below Correctly Determined That the State Courts of New Jersey Lack Jurisdiction Over this Action*

The true substance of the Complaint was aptly described by the trial court below. It noted that this action could be characterized as either (1) a border dispute between two states, (2) an action to abrogate or modify an interstate Compact, or (3) an action seeking a declaration of the rights of each State under that Compact. The trial court correctly determined that the state courts of New Jersey lack jurisdiction in all of these instances. (Pet. 13a).

If this action is viewed as a border dispute, it could only be initiated by one of the States before this Court and not by these petitioners before a New Jersey state court. *Nebraska v. Iowa*, 406 U.S. 117 (1972); *Ohio v. Kentucky*, 410 U.S. 641 (1973). Judge Humphreys correctly rejected petitioners' argument that he should exercise jurisdiction because the Supreme Court has deferred to other forums in certain disputes between states and ruled that this is "a classic case" for the exercise of original and exclusive jurisdiction by the United States Supreme Court. (Pet. 14a-15a); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

The New Jersey trial court specifically noted that the issues presented by the Complaint do not arise in the context of a suit by private parties over private property rights, claims over which an appropriate state court may exercise jurisdiction, even though a resulting judgment would not be binding upon the States. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Durfee v. Duke*, 375 U.S. 106 (1963). The trial court further determined that it did not have the power to abrogate or modify an interstate compact approved by Congress. *Texas v. New Mexico, supra.*

Petitioners have cited *Arizona v. New Mexico*, 425 U.S. 794 (1976), for the bald proposition that issues which might properly be raised between States, in an original action in the Supreme Court, may be conclusively determined in state court actions. Petitioners completely ignore, however, the circumstances of that case – circumstances which are in no way analogous to those which exist here. In *Arizona v. New Mexico*, New Mexico's taxing authority was challenged in its own courts, not in the courts of a sister state. Moreover, a political subdivision of the State of Arizona had joined in initiating that declaratory judgment action in the New Mexico state court. In contrast, the State of New York has appeared in New Jersey state court in this case, as a party defendant, very much against its will. New York has consistently maintained that a New York court would be the proper forum in which to challenge an exercise of New York's taxing power. *See Hill v. Joseph*, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct. N.Y. Co. 1954). The New Jersey Appellate Division agreed:

> Our affirmance of the judgment under review is without prejudice to the right of plaintiff Nidia Davila Colon to seek refund of the $1.35 sales tax paid to the state of New York or the City of New York, as the case may be, in connection with the purchase of items from the concession at Liberty Island in the appropriate New York court. This issue was not specifically raised before or decided by the trial court and counsel for the State of New York have recognized plaintiff

> Colon's right as an individual to seek such refund. *See Hill v. Joseph*, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct., Special Term 1954). (Pa 3a).

Petitioners should not be permitted to don the mantle of the State and to litigate in a state court issues which, if raised by either State, would be committed by the Constitution and laws of the United States to the original and exclusive jurisdiction of this Court. U.S. Const., Act., III, Sec.2, Cl.2; 28 U.S.C. §1251(a).

B. *This Action is Barred By the Doctrine of Sovereign Immunity*

Both New Jersey and New York are sovereign states. The trial court determined that New York's activities with regard to the Islands are not as a trespasser or interloper, but rather, are pursuant to the express terms of the interstate Compact. (Pet. 29a). Both New York and New Jersey recognize the doctrine of sovereign immunity except where it has been specifically waived by legislation (Pet. 21a); *see Glen v. Rockefeller*, 61 *Misc. 2d* 942, 307 N.Y.S.2d 46 (Sup. Ct. N.Y. Co. 1970) *aff'd*, 34 A.D.2d 930, 313 N.Y.S.2d 938 (1st Dept. 1970); *Cass v. State*, 58 N.Y.2d 460, 448 N.E.2d 786 (1982); *see also* New Jersey Tort Claims Act. *N.J.S.A.* 59:1-1, *et seq.*; *English v. Newark Housing Authority*, 138 N.J. Super. 425, 427-429, 451 A.2d 358 (App. Div. 1976). Given the existence of the doctrine in both States, the trial court explicitly and correctly rejected petitioners' argument that the ruling of the Supreme Court in *Nevada v. Hall*, 440 U.S. 410 (1979), would permit maintenance of this action.

Although the Supreme Court ruled in *Nevada* that the state courts of California did have jurisdiction over the State of Nevada, such jurisdiction was exercised within the extremely narrow context of a tort action. There, an employee of the University of Nevada travelled into California and caused injury to California residents on a California highway. In permitting a state court in California to exercise jurisdiction over the State of Nevada, the Supreme Court was very careful to note that:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different State policies, either of California or of Nevada, might require a different analysis or a different result. 440 *U.S.* at 424 n. 24.

This case does require a "different analysis" and a "different result." As was noted by the trial court:

> Plaintiffs in this case have no property rights or interests in the islands or in the statute. Their personal rights are indistinguishable from those of other New Jersey residents. Plaintiffs are challenging in a suit in New Jersey the authority of New York State over land bordering the two states. Plaintiffs, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 Compact. Exercise of jurisdiction by this Court would thereby pose a "substantial threat to our constitutional system of cooperative federalism." (Pet. 24a).

There is no conflict between the policies of the State of New Jersey and New York in this case. There is a single Compact and, until the States themselves decide otherwise, a single policy which governs the rights of both States. It is highly significant that the State of New Jersey has never taken issue with New York's sovereign immunity defense. Nor did New Jersey even suggest to the trial Court that New York's defense of sovereign immunity is in conflict with New Jersey's own public policy or somehow denies recognition to a significant policy of the State of New Jersey.

Indeed, in this Court, New Jersey has stated that "What is clear from the majority in *Nevada v. Hall*, is that the

acceptance of a sister state's claim of sovereign immunity is a matter of state law, not constitutional compulsion. *id.* at 418-419, 425-427. Accordingly, there is no basis to grant review of this application of New Jersey law and policy." (N.J. brief, pg. 13-14).

C. *The Principle of Comity Bars this Action*

The trial court dismissed the complaint on the additional ground that permitting this action would "violate principles of comity between states fundamental to our federal system." The court found that the issues raised here go to the "very heart of the governmental function" and that the public policy of New Jersey would not be contravened by the Court's refusal to hear this suit. (Pet. 36a).

The trial court's ruling is buttressed by the Constitutional commitment of disputes between states over territory to the original and exclusive jurisdiction of the Supreme Court of the United States (*see* Point A, *infra*), and by the conviction that discussion and accommodation, such as the Memorandum of Understanding entered into between the Governors (*see* footnote 1, *supra*), are preferable to litigation (*see Texas v. New Mexico*, *supra*, 462 U.S. 554). As the trial court observed, the litigation of disputes between states in the courts of one of the states involved "would give the appearance if not the fact of blatant partisanship" and would produce "discord and ill feeling, not amity and comity". (Pet. 41a). A review of New Jersey case law reveals that, in keeping with the concept of comity, New Jersey courts have often declined to exercise jurisdiction over New York. *See Interstate Wrecking Co., Inc. v. Palisades Interstate Park Comm'n*, 57 N.J. 342, 273 A.2d 10 (1971); *Liquid Carbonic Corp. v. City of New York*, 150 N.J. Super. 119, 374 A.2d 1258 (App. Div. 1977). *But see Martin v. Educational Testing Service, Inc.*, 179 N.J. Super. 317, 431 A.2d 868 (Ch. Div. 1981). This case does not warrant departure from a principle so vital to interstate relations.

D. *Petitioners Lack Standing To Bring This Case Against These Respondents*

No controversy presently exists between the parties with the sole right to litigate the issues raised by the complaint, *i.e.*, the States of New Jersey and New York. If such a controversy did exist, petitioners would be strangers thereto. *Bergen County v. Port of N.Y. Authority*, 32 N.J. 303, 160 A.2d 811 (1960). As the State of New Jersey has correctly pointed out, standing is an issue of State law.* (N.J. brief, p. 15) Petitioners lack even the "slight additional private interest" sufficient to afford standing in New Jersey. *Salorio v. Glaser*, 82 N.J. 482, 14 A.2d 943, *appeal dismissed* and *cert. denied*, 449 U.S. 804, 449 U.S. 874 (1980). Their interests are, in the words of the trial court, of "gossamer texture" and "are no more nor less than any citizen of the United States." (Pet. 44a). These petitioners, as individual citizens, have no right to assert claims which are among the prerogatives of a sovereign state government. The State of New Jersey has agreed with the State of New York that petitioners lack standing to bring this suit. (Pet. 37a-38a).

In dismissing the Complaint, the trial court noted that the elected representatives of the people must govern and that private individuals can neither exercise rights of sovereignty reserved to state governments nor ask a court to do so for them. (Pet. 47a). The petitioners have pointed to no authority which supports their attempted usurpation of sovereign governmental right and authority. As the New Jersey Supreme Court has noted, standing is an issue which must be determined by reference to the other parties and to the subject matter of the litigation. *See New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 411 A.2d 168 (1980). A court has a right and an obligation to determine where

---

* In support of their motion to remand the action to the State Courts of New Jersey, petitioners vigorously argued, *inter alia*, that the case should be remanded to the State Court of New Jersey because this lawsuit is "predicated on standing under New Jersey state law and not on federal constitutional standing." Brief in support of motion to remand case to state court returnable January 28, 1985, at 6.

a litigation, if permitted to proceed, is likely to lead, before being asked to recognize plaintiffs' right to bring the action in the first instance. Given the serious jurisdictional and sovereign immunity issues present in this case and the tenuous relationship of these petitioners to the other parties and to the real subject matter of the suit, it is respectfully submitted that it would be difficult for a New Jersey state court to have any degree of confidence "in the integrity and soundness of [its] adjudication." *Id.* The trial court's determination that these petitioners lack standing is correct and should not be disturbed.

CONCLUSION

All of the issues in this case have been correctly decided by the New Jersey courts below. It is respectfully submitted that this case presents no reasons for discretionary review by this Court.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
State of New York
120 Broadway
New York, New York 10271
(212) 341-2603

O. PETER SHERWOOD
Solicitor General

JUDITH T. KRAMER
ELLEN J. FRIED
Assistant Attorneys General
Of Counsel